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E.O. 12958: N/A

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SUBJECT: HONG KONG'S NEW COPYRIGHT AMENDMENTS WELCOMED BY
INDUSTRY

11. Summary: After more than a year of consultations with industry and consumer protection groups, the Hong Kong Government (HKG) has passed amendments to the Hong Kong Copyright Act. Industry associations and IP rightholders are pleased with revisions that lower the bar for Hong Kong Customs to initiate criminal cases, increase penalties for circumvention of technical protection measures, and hold company directors criminally liable if their companies use counterfeit products in the course of business. A compromise measure to relax restrictions on parallel imports met with industry approval but fair use provisions for educational institutions were criticized as overly broad. IPR protection groups are expecting the HKG,s next step will be to create digital protection laws; a discussion paper is currently being drafted and should be published before the end of the year. End Summary.

12. Comment: The June passage of these amendments to the copyright law is a positive development for Hong Kong,s copyright protection framework. The amendments updated a law that had last been revised in 2001 and had fallen behind the times. The HKG deserves high marks for its willingness to consult with intellectual property rightholders who were generally pleased with the changes to the law. However, Hong Kong authorities have yet to address digital rights management, need more serious enforcement actions against counterfeit pharmaceuticals, should consider reforms to the legal system that makes civil remedies prohibitively expensive, and provide legal recognition of U.S. copyright registrations. Some rightholders complain that the consultation process took too far too long and are waiting to see whether enforcement action will follow. Rightholders agree that Hong Kong's IPR protection remains a model for the region in many ways, but has fallen behind others in the region in some sectors. End Comment.

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Director,s Liability for Infringing Workplace
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13. A lengthy consultation process concluded June 27, 2007 with the first revisions to Hong Kong,s copyright laws since 12001. Among the more significant provisions is the establishment of criminal liability for company directors found to be using copyright infringing products in the course of business. Directors and partners can escape criminal liability if they can show that they were unaware, did not authorize and specifically took steps to prohibit use of infringing products. These steps can include budgeting funds to purchase legitimate product and demonstrating policies, practices, and actions designed to prohibit and prevent the

use of counterfeit products in the workplace.

¶4. Employees may also be held liable for use of infringing products in their work, but can escape liability if able to demonstrate that they were not in a position to authorize installation or removal of infringing materials. Local business associations, including the Hong Kong General Chamber of Commerce and the Chinese Manufacturing Association of Hong Kong, raised concerns that business leaders would be unfairly forced to bear liability for the actions of their staff, while the Business Software Alliance (BSA) complained that the law continued to leave a large loophole for directors and partners to avoid prosecution. Although the law officially went into effect when gazetted on July 7, the Hong Kong government plans to conduct educational activities to ensure business owners are aware of their obligations and can correct any shortcomings. The director liability provisions are not expected to be enforced before the beginning of 2008.

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Support for Technical Protection Measures Strengthened

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¶5. The International Federation of Phonographic Industries (IFPI) was particularly pleased with the addition of criminal liability for circumvention of technical protection measures (TPMs). (Note: previously TPM circumvention was only a civil offense and police would not pursue investigations against violators. End Note.) Businesses providing TPM circumvention services or devices, regardless of whether they charge for the service or device will now be held criminally liable. A person using such a service or device can be held civilly liable under the amended law. While there are some

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limited exceptions to the TPM circumvention regulations for research and security testing, IFPI representatives in Hong Kong told econoff the industry "got everything it wanted" in the current law.

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But Parallel Import Restrictions Loosened

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¶6. The amendments also relaxed restrictions on parallel imports, reducing the period in which parallel imports are prohibited from 18 to 15 months of the release of the work. This was a compromise with industry; the original proposal had called for reducing the prohibited period to 9 months. Representatives from the Motion Picture Association of America (MPAA) were pleased with the results of their consultation with the government and told econoff that because the amendments set the date of official video release, not the film release, as the effective date for protection to begin, film makers could actually benefit from an increased period of protection under the new law.

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Fair Dealing Still Not Fair Says Industry

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¶7. The IPR-protection associations criticized the liberalization of "fair dealing" provisions as overly broad and open to abuse by Hong Kong's numerous commercial educational institutions. These provisions allow educational institutions to use portions of copyrighted works for educational purposes as long as certain subjective requirements are met. The amendments also allow a specified number of copies to be made under a "safe harbor" exception -- the allowable number is determined by the number of copies, the percentage copied and the retail cost of the work. Copying of newspapers, magazines, books and periodicals beyond the safe harbor limits will now be a criminal offense. The Hong Kong government has responded to industry criticisms by noting that the fair dealing

provisions are based on U.S. regulations. The Hong Kong Commerce and Economic Development (HKCED) Bureau is currently drafting implementing regulations and expects to issue them before the end of 2007.

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Coming Attractions: The Digital 21 Agenda
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¶8. Hong Kong has periodically conducted a review of its digital technology laws since 1997, with an eye towards improving infrastructure, promoting innovation and creating the legal environment that will allow digital content industries to thrive. The 2007 Digital Agenda consultation paper was circulated in October 2006 and received over 70 comments. An April 2007 Digital Agenda Forum, organized by Sin Chung-kai, the Information Technology Functional Representative in the Legislative Council (LegCo), drew additional comments from the public and industry. HKCED is currently in the process of reviewing the comments and drafting legislation that will address questions of ISP liability, codifying notice and take-down requirements, and considering whether current criminal liability provisions for uploading copyright infringing materials can be extended to cover downloading as well.

¶9. According to CED, draft proposals could be ready for public consultation before the end of 2007 but are unlikely to be considered by the LegCo in this session. The current LegCo session will close in 2008. Any legislation not passed before that time will need to be reintroduced in the newly elected LegCo. Given that a major revision of the copyright law has just been passed and the difficulty of soliciting and responding to comments before the end of the current LegCo session, CED plans to submit the draft to the new Legislative Council for consideration late in 2008.

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Still Areas for Improvement
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¶10. Intellectual property protection associations were pleased with the results of their consultations with the HKG, but pointed out that Hong Kong is falling behind in some important areas. Hong Kong's slow consultation process

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means that downloaders and users of pirated media will continue to be free from criminal sanctions. High legal fees make the cost of civil action prohibitive, allowing violators to continue their infringing activities with impunity. Trademark violations in company registrations continues to be a problem and Hong Kong authorities still do not provide legal recognition of U.S. copyright registrations. Rightholders complain that the HKG is unwilling to share information on IPR crimes that could be used to pursue cross-border IPR investigations and are discouraged by Hong Kong's lack of enthusiasm for prosecuting pharmaceutical counterfeiting and transshipment cases.
Cunningham